

## **DIVISION OF FACILITIES CONSTRUCTION & MANAGEMENT PROFESSIONAL SERVICES AGREEMENT**

THIS AGREEMENT, made this \_\_\_\_th day of \_\_\_\_\_, 2003, by and between the DIVISION OF FACILITIES CONSTRUCTION AND MANAGEMENT, hereinafter called the "Owner", and \_\_\_\_\_, a corporation of the State of Utah, whose address is \_\_\_\_\_, Utah 84\_\_\_\_ hereinafter called the "Consultant."

WITNESSETH: That whereas, the Owner intends to have services performed by Consultant as follows:

### **\_\_\_\_\_ - INSPECTION AND TESTING SERVICES**

**\_\_\_\_\_, UTAH**

WITNESSETH, WHEREAS the Owner intends to have Consultant fully complete the objectives of this Agreement, and

WHEREAS, the Consultant, for the sum herein stated, agrees to perform the Scope of Work hereinafter specified,

THEREFORE, the Owner and the Consultant, for the consideration hereinafter provided, agree as follows:

**ARTICLE 1. SCOPE OF WORK.** The scope of work shall include building, electrical, plumbing, and mechanical inspection services, special inspections and material tests as specified by the specific project and as stated in this Agreement and further specified in Exhibit A, which is attached hereto and by this reference incorporated herein. This Agreement shall commence upon the written issuance of a Notice to Proceed by Owner and shall remain in effect through the duration of the project and completion of the punch list.

**ARTICLE 2. EXTENT OF AGREEMENT.** This Agreement includes the Solicitation for Consultant Services under which the services covered by this Agreement were procured, all exhibits or other documents that are attached to this Agreement or incorporated by reference, and the DFCM General Conditions current as of the date of this Agreement which are incorporated herein by this reference. In case of conflict, the following documents supercede each other in accordance with the following hierarchy: codes and applicable law, the body of this Agreement, attachments to this Agreement, the Solicitation for Consultant Services under which the services covered by this Agreement were procured, and the DFCM General Conditions.

### **ARTICLE 3. COMPENSATION.**

3.1 Not-to-Exceed Amount. The maximum amount payable for code inspections, special inspections, material testing, and for all reimbursable expenses for this project is **NOT TO EXCEED** \_\_\_\_\_ DOLLARS AND NO/00 (\$\_\_\_\_\_.00).

3.2 Payments. The Owner agrees to pay the Consultant from time to time as the work progresses, but not more than once each month after the date of the notice to proceed, and only upon receipt

of an invoice containing sufficient detail to justify the amount of payment requested. Payment shall be made within thirty (30) days of the Owner's receipt of the Consultant's invoice except that this requirement shall not apply to any amount: (a) for which the Consultant's invoice does not provide sufficient detail to demonstrate payment is due, (b) that the Owner disputes is due under the terms of the agreement, or (c) reasonably withheld by the Owner to cover any default or failure to perform by the Consultant. The Owner shall provide written notice to the Consultant of any adjustment to or rejection of Consultant's invoice. Interest shall accrue at the rate of 1% per month for amounts not paid within the requirements of this article.

3.3 Determination of Costs. Owner is relying on the expertise of Consultant in preparing the refined scope of work in order to assure that the inspection activities are defined and performed at a level necessary to fulfill all safety and contract documents compliance issues. Both parties shall cooperate in good faith to sequence inspections in order to reduce costs while assuring proper performance. Payments shall be determined as follows:

3.3.1 Number of inspection hours multiplied by the hourly rate in Exhibit A.

3.3.2 Number of trips multiplied by the trip expense for the project identified in Exhibit A. Trip expense shall include time and transportation to and from the job site. All billable trips must be requested in advance by the Contractor's superintendent or Owner's Building Official (hereinafter "Building Official").

3.3.3 The Consultant's fee may include reimbursement for lodging and meals which are related to requested inspections that are not within 100 miles of travel from inspector's home or office or require overnight stay. Said compensation for Consultant will be at the then current State of Utah rate for lodging and meals used for State employee reimbursement or a higher amount if approved by the Building Official due to unusual circumstances. These expenses are included in the guaranteed maximum price amount. The Owner will not pay a mileage allowance.

3.3.4 Fees for material testing and special inspection expenses shall be calculated by multiplying the hours and the type of tests performed by the applicable rates in Exhibit A.

3.3.5 The Consultant fee may include a management fee for overseeing the work of special inspection and materials testing Subconsultants. The fee for such work shall be \_\_\_% of the Subconsultant's fee for said services. The Consultant shall not be paid a management fee for special inspections and material testing services provided by the Consultant.

#### **ARTICLE 4. CHANGES IN WORK.**

4.1 Agreement Modifications. Any changes in the scope of the services to be performed under this Agreement shall be in the form of a written modification to this Agreement, mutually agreed to and signed by duly authorized representatives of both parties, specifying any such changes, fee adjustments resulting therefrom, any adjustment in time of performance, or any other significant factors arising from the changes in the scope of services. Said modification must be signed by both Owner and Consultant **IN ADVANCE** of the Consultant performing the work that is the subject of the change. It shall be the responsibility of the Consultant to notify the Owner of any work it may contend is beyond the scope of this Agreement in advance of the performance of such work.

4.2 Scope Of Work Change. Consultant shall immediately notify Owner of substantial changes in building plans, specifications, Contractor's schedule or planned scope of work that may affect the guaranteed maximum price amount. Change of the guaranteed maximum price amount caused by substantial changes must be negotiated and agreed to in writing by Owner and Consultant as a modification to this Agreement. No adjustment in the not-to-exceed contract amount shall be paid if Consultant fails to notify Owner of substantial changes when the change occurs.

## **ARTICLE 5. CONSULTANT'S DUTIES.**

5.1 Discipline and Competence. The Consultant shall enforce strict discipline and good order among the Consultant's employees, its Subconsultants, agents, representatives and other persons performing under this Agreement. The Consultant shall not permit employment of unfit persons or persons not skilled in tasks assigned to them. Consultant and Subconsultants shall always conduct themselves in a professional and courteous manner. Methods of intimidation, anger, or other non-professional conduct will be grounds for termination of the offending person or the termination of this Agreement, as determined by the Owner. Consultant must perform in a manner that is consistent with customary practices.

### **5.2 Building Inspections.**

5.2.1 All inspections shall be in conformance with the State adopted Building, Electrical, Mechanical, and Plumbing Codes and the Owner's specifications as contained in the construction documents.

5.2.2 The inspector will report directly to the Building Official. The inspector will perform inspection and other services as directed by the Building Official.

5.2.3 All of the Consultant's inspectors (except special inspections) must be licensed in the State of Utah in one or more of the following areas. Inspector: I Combination, I UBC, I NEC, I IPC and I IMC. All inspectors will submit qualifications to be approved by the Building Official. Inspectors will not perform inspections in trade areas for which they are not properly licensed by the State of Utah.

5.2.4 Consultant shall notify the Building Official at least two business days prior to any change in the primary person performing on site inspections. The replacement inspector is subject to approval by the Building Official.

5.2.5 Consultant shall regularly visit site and make note of any work which has been covered without being inspected. Consultant shall immediately notify the Building Official of any work that has been covered without inspection.

### **5.3 Special Inspections and Materials Tests.**

5.3.1 Consultant is responsible to oversee the special inspections and material tests for the project. Duties include but are not limited to: site supervision, inspection coordination, test and inspection management, personnel management, reporting, conflict resolution and billing.

5.3.2 Consultant shall submit qualification of special inspectors and material testing personnel to the Building Official for approval. Personnel are not permitted on site until they have been approved.

5.3.3 Consultant shall meet with Subconsultants prior to beginning work to discuss the scope of the project. Consultant shall coordinate the work of Subconsultants to ensure that all required special inspections and materials tests are completed in a timely and efficient manner.

5.3.4 Consultant shall ensure that special inspecting/testing personnel have access to relevant construction documents before beginning their work.

5.3.5 Consultant shall periodically visit site to oversee the work of the Subconsultants. Time spent on site managing the inspection services and overseeing Subconsultants is not billable.

5.3.6 The Consultant shall not receive a financial benefit from the fees that are charged by a Subconsultant other than the management fee allowed in Article 3.3.5, Compensation.

## **ARTICLE 6. BUILDING INSPECTION PROCEDURES**

### **6.1 Building, Mechanical, Electrical, and Plumbing Inspections.**

6.1.1 The Contractor's superintendent will contact the Consultant to arrange for building inspections. The Consultant shall respond to all inspection requests no later than two (2) business days after receiving the request. If the Consultant cannot respond within this time period, he shall find a qualified Subconsultant and notify the Building Official prior to the inspection. The Consultant shall not initiate an inspection without an advance request from the Contractor's superintendent or the Building Official. Consultant shall immediately notify the Building Official if Consultant believes that inspections are required which are not being requested by the Contractor.

6.1.2 Consultant shall make note of all retests and associated expenses on the monthly invoice.

6.1.3 The Consultant's inspector, upon request, shall show proper identification to the Contractor. Any site-specific security clearance requirements must be complied with by the Consultant and Subconsultants.

6.1.4 Standards for all inspections. Inspections shall indicate whether there is compliance with:

- a. Current edition of the applicable building codes.
- b. Project drawings and specifications.
- c. Manufacturers recommendations and installation instructions.
- d. Applicable DFCM construction standards.

### **6.2 Special Inspections and Materials Tests.**

6.2.1 The special inspections and material tests will be conducted according to the project's construction documents and specifications and according to standard material testing and inspection practices. Additional inspections/tests may be requested by the Owner.

6.2.2 Contractor's superintendent will contact Consultant to schedule special inspections and material tests. Consultant will then schedule the appropriate personnel to complete the inspections or tests. Consultant will inform personnel of type of inspection, time requested, and location of work. The Consultant shall respond to all inspection requests no later than two (2) business days after receiving the request. If the Consultant cannot respond within this time period, he shall find a qualified Subconsultant and notify the Building Official prior to the inspection.

6.2.3 Consultant shall provide an on site sign-in log for inspection/testing personnel. The log shall include the time the inspector arrived and left, the type of inspection or test, and the inspector's name. The inspection/testing personnel shall complete the log entries before leaving the site.

6.2.4 Consultant shall document all failed inspections and tests on monthly invoices and the expense associated with retesting.

## **ARTICLE 7. SUBCONSULTANTS**

### **7.1 Required Approval.**

7.1.1 Subconsultants listed in Exhibit A shall be used for this work and not replaced during the course of this Agreement except with the advance written approval of the Building Official after complying with the following criteria.

a. The Consultant has established in writing that the change is in the best interest of the State of Utah.

b. The Consultant has established an appropriate reason for the change which may include, but is not limited to, the following reasons: the original Subconsultant has failed to perform, the original Subconsultant is not qualified or capable of performing, and/or the original Subconsultant has requested in writing to be released.

c. The circumstances related to the request do not indicate any bad faith in the original inclusion of the Subconsultant.

7.1.2 The Consultant shall not contract with a proposed person or entity to whom the Owner has made a reasonable and timely objection. The Consultant shall not be required to contract with anyone to whom the Consultant has made reasonable objection.

7.1.3 The change in Subconsultants shall be evidenced by a modification to this Agreement. This modification shall also address any impact the change may have on the fees contained in Exhibit A.

### **7.2 Subconsultant Relations.**

7.2.1 By appropriate enforceable agreement, the Consultant shall require each Subconsultant to be bound to the Consultant by the terms of this Agreement, and to assume toward the Consultant all the obligations and responsibilities which the Consultant, by this Agreement, assumes towards the Owner.

7.2.2 Each Subconsultant agreement shall preserve and protect the rights of the Owner and Consultant under this Agreement with respect to the work to be performed by the Subconsultant so that subcontracting thereof will not prejudice such rights, and shall allow to the Subconsultant, unless specifically provided otherwise in the Subconsultant agreement, the benefit of all rights and remedies against the Consultant that the Consultant, by this Agreement, has against the Owner.

7.3 Payment to Subconsultants. The Consultant shall promptly pay each Subconsultant, upon receipt of payment from the Owner, out of the amount paid to the Consultant on account of such Subconsultant's portion of the work, the amount to which said Subconsultant is entitled. The Consultant shall, by appropriate Agreement with each Subconsultant, require each Subconsultant to make payment to its Subconsultant in a similar manner.

## **ARTICLE 8. COMMUNICATION AND DOCUMENTATION**

8.1 Communications. Consultant shall promptly communicate to the Building Official and Owner's Project Director. Consultant may communicate directly with the Contractor about any Stop Work Order, an urgent health or safety matter at the site, or if the direct communication with the Contractor will facilitate the performance of the work by the Contractor. Any communication with the Contractor must be part of the inspector's report prepared at the site. Consultant shall not be entitled to rely upon any representation, statement or conduct of any person or entity, except as provided in this Agreement.

8.2 Documentation In General. Consultant shall prepare written reports to document the results of all inspections and tests and any discussions thereof with the Contractor. Consultant shall also take photographs and other means of documentation as may be appropriate. Consultant shall be prepared to take photographs of any inspection where such photograph assists in the understanding of the condition of the site or facility being inspected.

8.3 Inspection Reports. Consultant shall make a written report of each inspection indicating whether there is compliance with the project drawings and specifications, project specific criteria, and applicable codes. This report must be completed before leaving the project site. A copy of the inspection report listing necessary corrections shall be left with the Contractor's superintendent. Consultant shall make note of all retests and associated expenses on the monthly invoice. Consultant shall provide a copy of all reports to the Building Official, Owner's Project Director, and the Architect/Engineer within two (2) business days of the inspection. This delivery may be accomplished by courier, fax, electronic mail, or other means approved by the Owner.

8.4 Monthly Reports. Consultant shall provide a printed monthly report to the Building Official, Owner's Project Director, and the Architect/Engineer. In addition to the inspection reports, the monthly report shall include a list of testing and inspection issues that are not resolved as of the end of the month. It shall also include photographs as appropriate to document and explain the information contained in the report.

8.5 Special Inspection and Testing Reports. Consultant shall provide a report of the results of special inspections and materials tests to the Building Official, Owner's Project Director, and the Architect/Engineer within two (2) business days. Consultant shall notify Building Official of test or inspections that have failed and are not immediately correctable.

8.6 Immediate Notification of Unusual Problems. In addition, Consultant shall promptly notify the Building Official by telephone of any unusual problems discovered during the inspection. If the Building Official does not answer the telephone call, then a voice message shall be left for the Building Official.

8.7 Final Report. Within 30 days of substantial completion of the project, Consultant shall provide to the Building Official an electronic copy of all inspection and testing documentation related to the project.

8.8 Copies to Agencies. Upon Request, Consultant shall provide a copy of the above reports to the Using Agency.

8.9 Modification to Report Requirements. Notwithstanding the provisions of Article \_\_\_, the requirements of this Article 8 may be modified through alternative provisions contained in the attachments to this Agreement.

**ARTICLE 9. APPEAL OF CONSULTANT'S DECISIONS.** Consultant shall cooperate with and participate in any appeal made pursuant to the Owner's appeal process of consultant's decisions. Consultant shall provide reports, documentation, and testimony as required. Consultant shall be compensated for its reasonable costs to respond to an appeal only if the Consultant's decision is upheld in the appeal.

**ARTICLE 10. HAZARDOUS OR EMERGENCY SITUATIONS; STOP WORK ORDERS.** If the Consultant encounters a hazardous or emergency situation, the Consultant is authorized to issue any warranted Stop Work Order or any other customary means of resolving the hazardous or emergency situation. The Consultant shall immediately inform the Building Official and the DFCM Project Director of any action taken and provide a detailed analysis in the report prepared at the site. On the same day that the Stop Work Order is issued, Consultant shall provide a copy of this report to the Building Official and the DFCM Project Director. This delivery may be accomplished through electronic means.

**ARTICLE 11. INSURANCE.** To protect against liability, loss and/or expense in connection with the performance of services described under this agreement, the Consultant shall obtain and maintain in force during the entire period of this agreement without interruption, at its own expense, insurance as listed below from insurance companies authorized to do business in the State of Utah. Consultant shall require that the insurance requirements contained in this Article be met by each testing and inspection firm with which it subcontracts to accomplish its responsibilities under this Agreement. The following are minimum coverages that may be supplemented by additional requirements contained in the Solicitation for Consultant Services or any other document used to procure Consultant's services.

11.1 Professional Liability Insurance. The Consultant shall maintain, at its expense, Professional Liability Insurance, on a "claims made" basis, with an aggregate policy limit of not less than \$1,000,000. Unless project specific insurance is required by the Owner through a provision in the Solicitation for Consultant Services or an attachment to this Agreement, this coverage may be written under a practice policy with limits applicable to all projects undertaken by the Consultant but the coverage must be maintained in force for the discovery of claims for a period of three (3) years after the date final payment is made to the consultant under this Agreement. The policy must contain a "retroactive" or "prior-acts" date which precedes the earlier of, the date of this Agreement or the commencement of the

Consultant's services. The policy must also include contractual liability coverage applicable to the indemnity provision of this Agreement for those portions of the indemnity provisions that are insured under the Consultant's policy.

11.2 Worker's Compensation Insurance and Employers' Liability Insurance. Worker's Compensation Insurance shall cover full liability under the Worker's Compensation laws of the jurisdiction in which the work is performed at the statutory limits required by said jurisdiction. Employer's Liability Insurance shall provide the following limits of liability: \$100,000 for each accident; \$500,000 for Disease-Policy Limit; and \$100,000 for Disease-Each Employee.

11.3 Commercial General Liability Insurance. Commercial General Liability Insurance shall be on an "occurrence basis" and shall include insurance for premises and operations, independent contractors, projects/completed operations, and contractual liability coverage with limits not less than listed below. The State of Utah shall be named as an insured party, as primary coverage and not contributing, and the policy shall be endorsed to include a waiver of subrogation in favor of the State of Utah.

\$1,000,000	General Aggregate
\$1,000,000	Products-Completed Operations Aggregate
\$500,000	Personal and Advertising Injury
\$500,000	Each Occurrence

11.4 Other Insurance Coverages. Consultant shall maintain the following insurance at levels Consultant determines: Comprehensive Automobile Liability Insurance, Valuable Papers and Records Coverage and Electronic Data Processing (Data and Media) Coverage, and Aircraft Use. Any minimum requirements for these insurance coverages will be identified in the Solicitation for Consultant Services or any other document used to procure Consultant's services. Any type of insurance or any increase of limits of liability not described in this agreement which the Consultant requires for its own protection or on account of any statute, rule, or regulation shall be its own responsibility and at its own expense.

11.5 The carrying of insurance required by this agreement shall not be interpreted as relieving the Consultant of any other responsibility or liability under this agreement or any applicable law, statute, rule, regulation or order.

## **ARTICLE 12. TERMINATION**

12.1 Termination by Consultant. This Agreement may be terminated by Consultant upon seven (7) days written notice should the Owner fail substantially to perform, through no fault of the Consultant and the Owner has failed to cure the failure to perform within fourteen (14) days of the Owner's receipt of written notice of its failure to perform. Upon termination of this Agreement, the Consultant shall deliver all work performed to the Owner. In the event of termination, the Consultant shall be compensated for services properly performed under this Agreement up to date of the notice of termination.

12.2 Termination by Owner. The performance of service under this Agreement may be terminated by the Owner in whole or in part at any time, whenever the Owner shall determine that such termination is in the best interest of the Owner. Any such termination shall be effected by delivery to Consultant of a written notice of termination specifying the extent to which performance of work under the Agreement is terminated and the date upon which such termination becomes effective. The Consultant



acknowledges that in the event of such termination, its total remedy and monetary recovery from the Owner is limited to full payment for all work performed, plus reimbursables, under this Agreement up to the date of termination. Consultant further acknowledges that in the event of such termination, all work product, which includes but is not limited to all manuals, forms, contracts, schedules, reports, comments and any and all documents produced by Consultant under this Agreement up to the date of termination are the property of the Owner.

**ARTICLE 13. CLAIMS AND DISPUTES.** Any and all claims by or disputes between the parties arising out of or related to this Agreement shall be addressed as follows.

13.1 The party seeking such relief shall file a written notice with the other party within thirty (30) days of the date that the claimant is aware of, or should have been aware of, such claim. The notice shall set forth in reasonable detail the nature of and basis for the claim and the amount of damages or other relief sought. Notice of any counterclaims shall be provided in a similar manner within thirty (30) days of the receipt of the notice of claim.

13.2. The Director of the Division of Facilities Construction and Management or his designee (hereinafter referred to as the "Director") shall review the claim and any counterclaims and render a decision with sixty (60) days of the receipt of the initial claim unless the parties agree to an extension of this time. The Director may utilize a panel to review the claim and any counterclaims and recommend a decision to the Director.

13.3 Only after completion of the above claim resolution process, or the failure of the Director to render a decision within the timeframe required in section 12.2, the parties may pursue other dispute resolution processes as may be legally available.

**ARTICLE 14. MISCELLANEOUS PROVISION.**

14.1 Safety. The Consultant shall ensure that all employees and Subconsultants are aware of safety requirements before arriving on site. Safety requirements include, but are not limited to, wearing approved hard hat, safety glasses, and footwear.

14.2 Ownership Of Work Product. All work product, which includes, but is not limited to all manuals, forms, contracts, schedules, reports, documentation, photographs, data, electronic data, comments and any and all documents supplied to or produced by Consultant under this Agreement are the property of the Owner. Said work product and the information contained therein are the exclusive property of the Owner and are not to be used by Consultant on any other projects with any other parties except by the advance written agreement of the Owner. Consultant agrees to maintain the level of confidentiality, to the extent permitted by law, needed to protect the Owner's interest in the design, construction, and management of the project.

14.3 Legal Relationship. This Agreement is for the performance of services and not the sale of goods, and is to be construed according to the laws of the State of Utah. Consultant's relationship to the State is that of an independent contractor. No partner or employee of Consultant shall, by reason of this Agreement, become an employee of the State of Utah. The Consultant shall have no authorization, expressed or implied, to bind the Owner or the State of Utah to any agreement, settlement, liability, or understanding whatsoever, nor to perform any acts as agent for the Owner or the State of Utah except as specifically set forth in this Agreement. The Owner shall identify the desired performance outcome and the Consultant shall determine the manner and method of achieving that outcome consistent with professional

and customary practices. Nothing in this section is intended to limit or reduce any governmental immunities to the extent any may be available to Consultant by reason of its performance of inspections on behalf of the State of Utah.

14.4 Assignment. This Agreement shall be binding upon and inure to the benefit of the parties and their successors and assigns; provided, however, that neither party shall assign its obligations hereunder without the prior written consent of the other.

14.5 Hold Harmless Requirement. To the fullest extent permitted by law, the Consultant hereby agrees to indemnify and save harmless the State of Utah, the Division of Facilities Construction and Management, their officers, agents and employees from and against any and all claims arising from intentional or negligent acts, errors or omissions of the Consultant and its Subconsultants in the performance of any work under this Agreement.

IN WITNESS WHEREOF, the parties hereto have caused these presents to be executed the day and year first above written. Each signatory below represents that he/she is duly authorized to execute this Agreement and to bind the respective party to all the terms and conditions of this Agreement.

Witness/Attest

**CONSULTANT:**

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Date

\_\_\_\_\_  
Please type/print name clearly

Title: \_\_\_\_\_

\_\_\_\_\_  
Please type/print name clearly

**DIVISION OF FACILITIES  
CONSTRUCTION AND MANAGEMENT**

\_\_\_\_\_  
Kenneth E. Nye

Program Director - Capital Development

\_\_\_\_\_  
Date

Approved for expenditure:

Approved as to availability of funds:

\_\_\_\_\_  
Division of Finance

\_\_\_\_\_  
Date

\_\_\_\_\_  
Financial Manager, Division of  
Facilities Construction and Management

\_\_\_\_\_  
Date